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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 609

CLARENCE B. DANDRIDGE,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the Court of Appeals (R. 15), Chief Judge Edgerton dissenting, is reported at 247 F.2d 105. The District Court rendered no opinion other than an oral statement accompanying its denial of petitioner's motion to withdraw his plea of guilty (R. 14).

Jurisdiction

The judgment of the Court of Appeals was entered on July 8, 1957 (R. 16). The petition for a writ of certiorari, filed on August 6, 1957, was granted on November 12, 1957 (R. 30-31). 355 U.S. 866. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

Petitioner's request for leave to withdraw his plea of guilty to a charge of assault with a dangerous weapon was denied in the following circumstances: (1) the request was made before sentence, within five days of the entry of the plea; (2) petitioner stated that when he pleaded guilty he "was sick and not myself" and for that reason had not "realised" what he was doing in pleading guilty, but the District Court made no inquiry into this question; (3) a serious question exists whether petitioner is innocent of the crime to which he pleaded guilty which the District Court failed to apprehend because of its plainly erroneous views of the law pertinent to self-defense; and (4) petitioner was without the assistance of counsel in the preparation and at the hearing of his request to withdraw his plea of guilty, and the adequacy of his representation when he entered his plea of guilty is seriously in doubt. The following questions are presented:

1. Whether Rule 32 (d) of the Federal Rules of Criminal Procedure requires that, where a request for leave to withdraw a plea of guilty is made *before* sentence, discretion in favor of granting it should be exercised with substantially greater liberality than where the request is made *after* sentence.

2. Whether a person is entitled to the assistance of counsel in the preparation and presentation of his request to withdraw his plea of guilty.

3. Whether a request for leave to withdraw a guilty plea should be granted where one or more of the following circumstances appear:

(a) The defendant makes an ample showing that, but the District Court makes no inquiry whether, at the time the

guilty plea was entered the defendant "was sick and not myself" and for that reason had not "realised" what he was doing in pleading guilty.

(b) The District Court bases its conclusion that the defendant is clearly guilty of the crime for which he seeks to withdraw his plea on plainly erroneous views of the law pertinent to the crime.

(c) The adequacy of defendant's representation when he entered his plea is seriously in doubt.

Rule Involved

The rule involved is Rule 32 (d) of the Federal Rules of Criminal Procedure and it provides that:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Statement

On September 4, 1956, a two-count indictment was filed in the District Court for the District of Columbia charging petitioner with "Assault With A Dangerous Weapon" and "Carrying A Dangerous Weapon (22 D.C.C. 502,[1] 3204[2])" (R. 1). The first count of the indictment reads that:

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[1] "Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to prison for not more than ten years."

[2] "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a

> On or about July 8, 1956, within the District of Columbia, Clarence B. Dandridge made an assault on Robert W. Allen with a dangerous weapon, that is, a loaded pistol.

The second count reads that:

> On or about July 8, 1956, within the District of Columbia, Clarence B. Dandridge did carry, openly and concealed on or about his person, a dangerous weapon, that is, a pistol without a license having been issued as provided by law.

On September 7, 1956, petitioner pleaded not guilty (R. 2), and the matter was set for trial on October 4, 1956, but was on that day continued until October 16, 1956, for lack of an available courtroom (R. 14). On October 16, the date set for trial, petitioner appeared with his court-appointed counsel before Judge Alexander Holtzoff. After briefly describing the charges against petitioner, Government's counsel, Mr. Stevas, then advised the Court that he had "informed counsel for the defendant the Government would have no objection to letting him plead to the first count and move to dismiss the second count at the time of sentencing if there was such an indication on the part of the defendant"

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pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years." The provision for a maximum penalty of ten years for a conviction of violating the section after having been previously convicted of such offense, or of a felony, was added by an amendment enacted on June 29, 1953. 22 D.C. Code §3215, which prescribes the sentence absent such prior conviction, provides for a punishment "by a fine of not more than $1,000 or imprisonment for not more than one year, or both."

(R. 9). Asked by the Court "What are the facts" Government's counsel stated that (R. 9):

> The evidence will show . . . that the complaining witness was in the premises, the first floor of the same building that the defendant lived in. The defendant lived in the basement.
>
> Without any altercation taking place at the time of the shooting, from the Government's evidence it will show that the defendant fired a pistol at the complaining witness and that he was in excess of 18 inches distant because there were no powder burns on the complainant. The bullet struck the complainant in the left shoulder.
>
> • • •
>
> We can find no argument that preceded this except the fact that the Government's evidence will show a statement by the defendant that, "You beat me up before and you are not going to do it again."
>
> • • •
>
> The complainant fell down when he was shot. The defendant was apprehended shortly afterward in possession of the gun.

Upon the conclusion of this statement, the following colloquy ensued between the Court and petitioner's counsel (R. 9):

> The Court: How do you feel about this, Mr. Blaustein?
>
> Mr. Blaustein: The defendant's testimony would be that, on the night before, he was struck by the prosecuting witness, had a black eye and a fractured nose. During the following day, there were two other attacks on him and this last one, I suppose he was a little

upset after being attacked three times, and unfortunately, he pulled this gun out and shot this man.

The Court: Of course, that is no defense. Those matters might go into mitigation of sentence but certainly it is not self-defense.

Mr. Blaustein: I agree with Your Honor, except he does say that the prosecuting witness has frequently carried a razor.

The Court: No. The prior assaults by the victim of an assault is not sufficient to justify self-defense.

The Court then asked petitioner's counsel, "Do you want to go to trial or are you interested in what Mr. Stevas has suggested?" (R. 10). Counsel replied that "I think the defendant is but I would want to talk to him another minute or two" (R. 10). "After a short interval" (R. 13), petitioner's counsel stated that "the defendant will withdraw his plea of not guilty" (R. 10). Thereupon, the following colloquy ensued (R. 10):

Mr. Stevas: * * * I have been advised that defendant has been advised of his right to jury trial; no promises have been made to the defendant and I understand he desires to enter this plea freely and voluntarily of his own free will and accord.

That plea would be acceptable to the Government because the second count is part and parcel of the first count.

The Court: I will hear defendant's counsel.

Mr. Blaustein: . . . I have fully explained the circumstances and the consequences of this act to the defendant. I asked him to voluntarily make up his mind as to what he wanted to do. He has come to the conclusion that he will throw himself upon the mercy of the Court.

The Court: Have you apprised him of his rights?

Mr. Blaustein: I certainly have, Your Honor.

The Court: Clarence B. Dandridge, do you admit that you committed the offense to which you propose to plead guilty?

The Defendant: Yes, sir.

The Court: The Court will accept the plea.

Petitioner thereupon formally withdrew his plea of not guilty and entered a plea of guilty to Count 1 of the indictment charging an assault with a dangerous weapon (R. 10-11). With the referral of the case to the probation service for the usual presentence investigation, the hearing was concluded (R. 11).

Under date of October 21, 1956, five days after pleading guilty but before imposition of sentence, petitioner wrote to Judge Holtzoff "asking to change my plea of guilty to not guilty" (R. 3). The letter reads (*ibid.*)[3]:

Judge Holtzoff Your Honor Sir

I am writing asking to change my plea of guilty to not guilty. At the time I am writing thise letter I am much better than I was on the 16th Oct 1956 the day I plea guilty to the charge of assault with a dangerous weapon that is a loaded pistol. And at the time I plea guilty to the charge I was sick and not myself. And on the next day which was the 17th Oct I became more sick and on the 18th Oct they had to send me to the hospital which I am still is in the hospital.

And on the 13th Sept 1956 that was the first time I taken sick and was in the hospital from 13 Sept until Oct 1th 1956. My lawyer tell me I have a feloney charge against me which was a number charge in 1948 your Honor Sir sentence me to two to six months in jail.

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[3] Some corrections in spelling were made in the letter as it is reproduced in the printed record. The letter as quoted in the text uses the uncorrected spelling as it appears in the original.

Is that a feloney charge on my record.[4] So I come to a close.

On September 15, 1956, petitioner had been admitted to the District of Columbia General Hospital. He was diagnosed as having multiple urethral strictures with acute cystitis, and was discharged from the hospital on September 29, 1956. On October 18, 1956, two days after pleading guilty, petitioner was admitted to the District of Columbia Jail Infirmary with a diagnosis of epididymitis, being discharged on November 5, 1956.[5]

Petitioner's request to withdraw his plea of guilty was heard by Judge Holtzoff on November 2, 1956. After an introductory statement by the Court, the following transpired (R. 11-12):

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[4] On July 30, 1948, petitioner was given an indeterminate sentence of two to six months based upon his conviction upon a plea of guilty to a three-count indictment charging violations of sections 1501 and 1502, Title 22, D.C. Code. *United States* v. *Dandridge*, Criminal No. 816-48, D.C.D.C. Count 1 of the indictment charged that on June 12, 1948, petitioner "was concerned as owner, agent and clerk" in conducting "a lottery known as a numbers game"; count 2 charged him with selling "a chance, right and interest in a lottery, known as the numbers game"; count 3 charged him with possession of "certain tickets." The first two counts were embraced within Section 1501, the third count within Section 1502. As the Code stood in 1948, a conviction under Section 1501 subjected the offender to a fine of not more than $1,000 or to imprisonment for not more than three years, or both, and a conviction under Section 1502 to a fine of not more than $500 or to imprisonment for not more than six months, or both. 18 U.S.C. § 1 (1) provides that "Any offense punishable by death or imprisonment for a term exceeding one year is a felony."

[5] Except as indicated below, the statements in this paragraph are taken from the Government's Opposition To Petition For Leave To Proceed On Appeal In Forma Pauperis, pp. 2, 4, on file in the court below. The changes made in the text from the statements contained in the Opposition are based on the report received from the District of Columbia General Hospital. That report shows that petitioner was discharged on September 29, not September 28, and that, in addition to multiple urethral strictures, he had acute cystitis (R. 24).

The Court: Clarence B. Dandridge, why do you ask for permission to change your plea? You pleaded guilty knowingly and you expressly admitted to the Court, when asked, that you committed the offense. Why are you asking permission to change your plea?

The Defendant: At the time I hadn't seen no attorney and I was sick.

The Court: At that time, you had an attorney, of course.

The Defendant: I mean on July 9 [the day following the alleged assault], I had an attorney at the Court, the first date [October 4, at which time the trial was continued to October 16], and I haven't seen him no more since.

The Court: The Court appointed an attorney for you who consulted with you and who appeared with you at the time you changed your plea. I want to know why you are asking permission to change your plea.

The Defendant: Because I couldn't get my witnesses together at the time because of being sick and nervous. I couldn't think of the addresses. There are two witnesses. I was sick. I came out on the 1st [from the hospital] and I met my attorney on the 2nd and the trial was set for the 4th.

The Court: When the Court asked you if you committed the offense, you said yes, that you did.

The Defendant: I couldn't get my witnesses here.

The Court: What is your defense?

The Defendant: I have witnesses to prove that I did it in my self-defense. I mean I couldn't get the names. My wife knew them at the time.

The Court: Suppose you tell me what you claim to be self-defense.

The Defendant: He had been beating me three times that day and came across the street and I said I will wait until he leaves before I go home. Then when I

went home, he started to beat me again. That is the time I shot him. Where I live, he beat me three times in my own house and the officers, when I went to court, I had two black eyes and a fractured nose and so at the time, being sick—

The Court: Then you fired the gun at him, didn't you?

The Defendant: Yes, when he started to me, yes.

The Court: What did he beat you with?

The Defendant: I don't know. I had a fractured nose and two black eyes.

The Court: With his fist?

The Defendant: I guess so. I was trying to get out of his way each time, three separate times.

The Court asked petitioner's counsel whether he "wish[ed] to say anything" (R. 12). Counsel replied that (R. 13):

> Frankly, I have nothing to say, Your Honor. I went over this matter entirely with him before he entered his plea of guilty. He knew the circumstances and I believe we explained all of that to your Honor at the time and I was very much surprised when he wanted to change his plea.
>
> However, I interviewed several of the witnesses and I could not get any material evidence out of them that I felt would be helpful to him, even his own wife. However, if he has discovered some other witnesses and he wants to go to trial and the Court feels he should go to trial, I am prepared.

The colloquy then resumed between the Court and petitioner (R. 13):

> The Defendant: I have two more witnesses.
>
> The Court: What will they testify to?

The Defendant: That this Allen witness will testify that he came across the street after me so that he could stop this fellow from fighting me. I asked him why he didn't want me to go home and he said, "Robert was waiting to fight me." And I said, "I will wait until he goes."

The other witness was when he was taking me to headquarters. I asked him to take me to give the gun up. The old little lady where I live, she was nervous. I would never have left the house. I stayed there until the law come.

The Court: You have not said anything to justify the shooting.

At this stage Government's counsel stated the bases for his opposition to the motion to withdraw the plea of guilty, namely, (1) that petitioner chose to "enter a plea of guilty because he was guilty and for no other reason," (2) that the "Government feels, at this stage now, we having been ready for trial, that the plea should stand," and (3) that petitioner is unable to establish "any issue of self-defense" (R. 13-14). The District Court denied leave to withdraw the plea of guilty, stating that (R. 14):

> The Court is of opinion that the ends of justice do not require that the defendant be permitted to withdraw his plea of guilty. He entered the plea deliberately. He expressly admitted his guilt in open court and now, on his own statement, he does not set forth sufficient facts which would warrant a plea of self-defense. He does not deny that he shot the complaining witness but, on his own statement of the facts, even if those facts were as he contends them to have been, they are not sufficient justification for a plea of self-defense. In any event, certainly he didn't think there was when he pleaded guilty.
>
> The motion for leave to change the plea is denied.

On December 7, 1956, petitioner was sentenced to three to nine years for assault with a dangerous weapon (R. 5). Contemporaneously, count 2 of the indictment, carrying a dangerous weapon, was dismissed (R. 4). Under date of December 13, 1956, petitioner wrote to the Clerk of the District Court "to appeal my case" (R. 6). His letter stated that (R. 6):[6]

> I am writing to appeal my case on the ground insufficient consul. That he advise me to plea guilty to assault with a dangerous weapon that is a load pistol so that they would drop charge of carrying a dangerous weapon. I had been sick in hospital here in jail since 13th of Sept 1956 to the first of Oct. 1956.
>
> And my trial was to be on the 4th Oct 1956 and the first time I seen my attorney was on Oct 2th 1956. And I answer my indictment on the 6th of Sept 1956 and on the 4th of Oct 1956 I went to court but they did not have the trial and I did see my lawyer either. So on the 16th Oct 1956 I went back to court and I was sick at the time I plea guilty to assault with a dangerous weapon.
>
> And with in 48 hours after I plea guilty was carried back to hospital on stretch and was given penucilen and ice pack for three days and I begin to feel better and then I realised what I had did so on the 21th 1956 of Oct I written to Honable Judge Alexander Holtzoff telling him I was sick at the time I plea guilty I was not my self. So on Nov first 1956 I was back in court to see Honable Judge Alexander Holtzoff to tell him why I want to change my plea of guilty to not guilty. I try to explain to him but I just could get the words together. Because I was still sick and was still in the hospital. And he ask my attorney about it and all he

[6] See note 3 *supra*.

said he did know anything about I want to change my plea and so Judge Holtzoff deny my plea. As my attorney is a court appoint attorney. And on the 7th Dec 1956 I was sentence by Honable Judge Alexander Holtzoff to three to nine years.

On December 31, 1956, petitioner applied for leave to appeal without prepayment of costs (R. 7). On January 8, 1957, leave was denied by Judge Holtzoff, who certified that "the appeal is not taken in good faith" (R. 7). Meanwhile, on January 2, 1957, construing petitioner's letter to the Clerk of the District Court "to appeal my case" as a motion to withdraw the plea of guilty, Judge Holtzoff denied it, stating that "This is a repetition of a prior motion" (R. 8). Petitioner moved the court below for leave to proceed on appeal in forma pauperis, and that court granted leave.

In the court below, petitioner moved for leave to file his own affidavit and an affidavit of his attorney appointed to represent him in that court (R. 16). Petitioner's affidavit sets forth matter relevant to the absence and inadequacy of his representation in the District Court, to the circumstances of his ill-health under which he entered his guilty plea after repeated refusals to plead guilty, and to the facts underlying his claim of self-defense (R. 17-19). The affidavit of petitioner's attorney incorporated medical reports from the District of Columbia General Hospital and the District of Columbia Jail Infirmary detailing the ailments suffered by petitioner shortly before and immediately after his guilty plea (R. 20-24). In support of the motion for leave to file the affidavits, petitioner stated that, as a result of the abbreviated character of the proceedings in the District Court, there was a failure to develop facts which should have been adduced there and which should be before the Court of Appeals in its consideration of the

appeal (R. 17). Over the Government's opposition (R. 25-26), the court below granted leave to file the affidavits (R. 26).

The Court of Appeals by a divided vote, Chief Judge Edgerton dissenting, affirmed the denial of leave to withdraw the plea of guilty, that court stating that "A hearing was conducted in which the District Judge questioned appellant and his counsel on the circumstances surrounding the making of a plea of guilty before he denied the motion. We find no abuse of discretion" (R. 15).

Summary of Argument

I

Rule 32 (d) of the Federal Rules of Criminal Procedure provides that a motion to withdraw a plea of guilty "may be made only before sentence is imposed," except that withdrawal of the plea will be permitted after sentence in order "to correct manifest injustice." Thus, the "language of Rule 32 (d) implies that withdrawal will be far more freely granted before judgment. . . ."[1]

Reason confirms the language. Before sentence a defendant cannot possibly be using withdrawal of a guilty plea as a gamble to escape a sentence severer than he expected when he entered his plea. Before sentence no substantial interest in finality has set in. Before sentence, therefore, the conditions are at their optimum for revesting the defendant with his right to trial by jury. Accordingly, "Leave to withdraw a guilty plea prior to sentencing should be freely allowed." *Poole* v. *United States*, C.A.D.C., Nos. 14,012, 14,013, 14,014, decided November 12, 1957, sl. op. p. 6.

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[1] Note, "Withdrawal Of Guilty Pleas In The Federal Courts," 55 Colum. L. Rev. 366, 379 (1955).

Whether before or after sentence, the court's discretion to permit withdrawal of a plea of guilty should be exercised liberally. Generally speaking, "it may be said that the withdrawal of a plea of guilty should not be denied in any case where it is *in the least evident* that the ends of justice will be subserved by permitting not guilty to be pleaded in its place."[8] "The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for *any* reason the granting of the privilege seems fair and just." *Kercheval* v. *United States*, 274 U.S. 220, 224 (emphasis supplied).

And so, in this case, where petitioner sought leave to withdraw his guilty plea before sentence, immediately upon recovering sufficiently from his illness to realize "what I had did" in pleading guilty (R. 6), discretion in favor of permitting withdrawal should be exercised with the utmost liberality.

II

Evaluation of the circumstances disclosed by this record, whether considered singly or in totality, amply demonstrates that the grant of petitioner's motion to withdraw his plea of guilty is required.

A. Petitioner entered his plea of guilty when he was sick and in pain. Yet, despite the fact that ill-health was the basis upon which leave to withdraw his guilty plea was predicated, expressed by petitioner both in writing in advance of the hearing (R. 3) and orally at the hearing (R. 11-12), the District Judge did not make the slightest inquiry into the question. Neither holding an accused to a guilty plea entered when he was sick and in pain, nor the failure to make any inquiry into the question, is in keeping with civilized administration of criminal justice.

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[8] 14 Am. Jur., Crim. Law, §287, p. 961 (emphasis supplied).

Thus, it seems plain that physical illness can be so severe, painful, and debilitating that it impairs the victim's ordinary capacity for discernment, judgment, and deliberation. For so awesome a decision as the entry of a guilty plea, upon which imprisonment without trial hangs, the law should be satisfied with nothing less than the maximum acuity and perception that an accused has the capacity to muster when he is in ordinary good health: Even if the capacity to exercise a discriminating judgment be unimpaired, it demeans the law to permit an accused to enter, or to hold him to, a guilty plea made when the accused should have been in a hospital bed and not a court room.

On this record it is not possible to say that petitioner's plea of guilty was uninfluenced by sickness and pain. Based upon any standard of fairness and justice—and surely in the light of the utmost liberality with which motions to withdraw guilty pleas before sentence should be allowed—vacation of the guilty plea is required without further ado.

B. Instead of inquiring into the question of petitioner's health, the District Judge conducted an inquisition of petitioner for the purpose of attempting to demonstrate that the admitted shooting was not justifiable as self-defense. The inquiry was thus wholly misdirected. For "withdrawal should not be denied where a proper showing for its allowance is made, merely because the defendant on a trial might or probably would be found guilty." *Bergen* v. *United States*, 145 F.2d 181, 187 (C.A. 8).

While the probability of guilt does not warrant denial of an otherwise meritorious request to withdraw a plea of guilty, the reasonable possibility of innocence surely warrants the grant of the request. Contrary to the assertions of the District Judge, a serious question exists, for determination by a jury, whether the admitted shooting in which petitioner engaged was justifiable as self-defense.

1. The assertions of the District Judge that no question of self-defense exists evidently stems from his view that a battery with fists cannot create a risk of serious bodily harm which would justify the victim of the assault in shooting in self-defense. This is true neither in common sense nor in law. "There may be such a difference in the size of the parties involved or disparity in their ages or physical condition which would give the person assaulted by fists reasonable grounds to apprehend danger of great bodily harm and thus legally justify repelling the assault by the use of a deadly weapon." *Easterling* v. *State*, 267 P.2d 185, 188 (Okl. Cr.). And in this case, petitioner had sustained a fractured nose and two black eyes at the hands of his assailant. Petitioner did not merely risk serious bodily harm from his assailant, he had already suffered it.

2. Equally baseless was the refusal of the District Judge to ascribe any significance to the statement that "the prosecuting witness has frequently carried a razor" (R. 9). Clearly, "evidence of deceased's violent character might have been given, *also that he habitually carried firearms or other deadly weapons . . .*" *Preston* v. *United States*, 65 App. D.C. 110, 111, 80 F.2d 702, 703 (emphasis supplied).

3. There is, moreover, strong authority for the proposition that, to justify the use of force to repel an attack, where the defending act does not result in death, it is unnecessary to show risk of serious bodily harm; it is enough to justify an act in self-defense that the person is resisting an assault, even if the assault does not threaten serious bodily harm. *State* v. *Woodward*, 58 Idaho 385, 74 P.2d 92, and cases cited, 74 P.2d at 95-96. And so, in this case, complainant clearly subjected petitioner to an assault, and petitioner therefore had the right to resist. The only question presented, to be determined by a jury, was whether the quantum of force used by petitioner was in excess of

what under the circumstances appeared reasonably requisite to repel the assault.

4. Petitioner's affidavit filed in the court below places the seriousness of the question of self-defense beyond the possibility of cavil. As petitioner there states (R. 19), "As I was trying to open the door in the dining room which leads to the stairs to my quarters in the basement, Allen rushed towards me with his right hand up. There was something in his right hand which was shining. I knew he carried a razor; he showed it to me many times. I shot Allen to defend myself. He fell on my left foot." Were a jury to accept petitioner's statement, it would be required to acquit him.

C. Petitioner was without the assistance of counsel in the preparation or presentation of his request to withdraw his plea of guilty, and the adequacy of his representation when he entered his plea of guilty is seriously in doubt.

1. Petitioner's request to withdraw his guilty plea was written in his own hand. He had no assistance of counsel in the preparation of it (R. 17). He was equally without the assistance of counsel at the hearing upon it. Indeed, the attorney whom the District Court had appointed to represent petitioner took a position adverse to petitioner at the hearing upon his request to withdraw his plea. Petitioner had worse than no representation at all.

Thus the fundamental protection of "the guiding hand of counsel at every step in the proceedings" (*Powell v. Alabama*, 287 U.S. 45, 69) was not vouchsafed petitioner. The withdrawal of a guilty plea is as important a step in a criminal proceeding as any. The safeguards that the procedure for withdrawal is designed to afford cannot be realized without the assistance of counsel. It is therefore essential that a defendant have the assistance of counsel,

in the absence of an intelligent and informed waiver, in a proceeding under Rule 32 (d). Petitioner had none.

2. Not only was petitioner without counsel when he sought to withdraw his guilty plea, the adequacy of his representation when he entered it is seriously in doubt. The attorney appointed to represent petitioner in the District Court either shared or acquiesced in the District Judge's plainly erroneous views of the law pertinent to self-defense. The adequacy of the time spent by the attorney with petitioner in preparation for trial is questionable. Prior to the first trial date on October 4, 1956, counsel spoke with petitioner for about 30 minutes on October 2 and for about 40 or 50 minutes on October 3 (R. 17). At each of these meetings, rejecting the suggestions of his attorney to do so, petitioner stated that he would not plead guilty to the assault charge because he was not guilty of it; he would "rather go to trial" (R. 17-18). Despite this reiterated refusal to plead guilty to the assault charge, and without further discussions from October 3 up to October 16 (R. 17), counsel permitted petitioner to plead guilty to the assault charge on October 16. At that time petitioner was sick and in pain. Finally, the attorney gave the Government an affidavit adverse to petitioner to be filed, as it was, with the court below (R. 29-30), apparently not sensitive to the abridgment "of the attorney-client privilege and . . . accused's right to counsel" which such an affidavit necessarily entails. *Gunther* v. *United States*, 230 F.2d 222, 224 (C.A.D.C.).

If the test of adequate representation is the effective "assistance of zealous and earnest counsel" (*Avery* v. *Alabama*, 308 U.S. 444, 450), this record leaves an unstillable sense of disquietude that petitioner did not enjoy "the constitutional right of an accused to assistance of counsel . . ." (*id.* at 445). And surely a serious doubt as to the adequacy of representation when a guilty plea is entered

suffices to require that leave be granted to withdraw it. For no more is involved in withdrawal, where it is promptly sought before sentence, than that the accused shall have a jury trial at which his guilt or innocence may be established.

D. In the District Court, the Government stated (R. 13-14), and the District Judge intimated (R. 11), that withdrawal of the plea of guilty should not be permitted because "The witnesses were here, the jury was here and we were ready to proceed. * * * The Government feels, at this stage now, we having been ready for trial, that the plea should stand." The inconvenience to the Government of setting a new trial date is trivial to the point of absurdity when balanced against petitioner's interest that only a jury's determination of his guilt shall deprive him of his freedom from imprisonment.

No less unsatisfactory is the basis of the decision below. The Court of Appeals by a divided vote, Chief Judge Edgerton dissenting, stated briefly, "We find no abuse of discretion" (R. 15). Disposition of the issues in this portmanteau will not do. It is not discretionary but obligatory to permit a defendant to withdraw a guilty plea made when he was sick and in pain; it is not discretionary but obligatory to inquire into the question whether the defendant was sick and in pain; it is not discretionary but obligatory to grant an otherwise meritorious request to withdraw a guilty plea although the judge may be convinced the defendant is probably guilty; it is not discretionary but obligatory to apply correct views of the law relevant to the crime in assessing the guilt or innocence of the defendant; it is not discretionary but obligatory to vacate a plea of guilty when the establishment of innocence appears reasonably possible; it is not discretionary but obligatory that a defendant have the assistance of counsel upon a motion to withdraw a guilty plea; and it is not discretionary but obligatory to

permit withdrawal of the guilty plea where the adequacy of the defendant's representation when he entered it is seriously in doubt. The unresponsiveness of the decision below to the issues presented is thus patent. The sound administration of criminal justice is not promoted by adjudication which sweeps the chessmen off the board. Moreover, even if it could be said that the issues lie within the domain of discretion, it is hard to imagine what more must be made to appear before abuse is shown.

ARGUMENT

I.

In the Interpretation and Application of Rule 32(d) of the Federal Rules of Criminal Procedure, (1) Discretion in Favor of Granting a Request for Leave to Withdraw a Guilty Plea Made Before Sentence Should Be Exercised With Substantially Greater Liberality Than Where the Request Is Made After Sentence; and (2) At Any Stage, Whether Before or After Sentence, Discretion Should Be Exercised Liberally.

The determination of this case is governed by the interpretation and application of Rule 32(d) of the Federal Rules of Criminal Procedure. To provide a frame of reference within which to evaluate the particular circumstances of this case, it is necessary first to consider the general approach which should be taken in the adjudication of a motion to withdraw a guilty plea. To this end, we now show that (1) where, as here, a request for leave to withdraw a guilty plea is made *before* sentence, discretion in favor of granting it should be exercised with substantially greater liberality than where the request is made *after* sentence; and (2) at any stage that the request is made, whether before or after sentence, discretion in favor of it should be exercised liberally.

Rule 32(d) of the Federal Rules of Criminal Procedure provides that:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.*

It is apparent on the face of Rule 32(d) that it draws a sharp line in favor of lenity when the motion to withdraw a plea of guilty is made before sentence. *After* sentence, withdrawal is permitted to correct "manifest injustice." *Before* sentence, therefore, the Rule necessarily contemplates that the approach to the withdrawal of a guilty plea will be substantially less austere.

The reasons for the difference are clear. Before sentence a defendant cannot possibly be using withdrawal of a plea of guilty as a gamble to escape a sentence severer than he expected when he entered his plea. Before sentence no substantial interest in finality has yet set in. Before sentence, therefore, the conditions are at their optimum for revesting the defendant with his right to trial by jury which, but for his guilty plea, was inalienably his and which he has promptly sought to reclaim. Accordingly, reason confirms and the "language of Rule 32(d) implies that with-

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* Rule 32(d) superseded Rule II (4) of the Criminal Appeals Rules, effective September 1, 1934, which had provided that: "A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed." 292 U.S. 661. The Advisory Committee on Rules for Criminal Procedure noted concerning Rule 32(d): "This rule modifies existing practice by abrogating the ten-day limitation on a motion for leave to withdraw a plea of guilty." S. Doc. No. 175, 79th Cong., 2d Sess., 55. See *Von Moltke* v. *Gillies*, 332 U.S. 708, 718, n. 4.

drawal will be far more freely granted before judgment. . . ." [10] And so, as the Court of Appeals for the District of Columbia Circuit properly observed in *Poole* v. *United States*, Nos. 14,012, 14,013, 14,014, decided November 12, 1957, sl. op. p. 6:

> Leave to withdraw a guilty plea prior to sentencing should be freely allowed. As we said in *McJordan* v. *Huff*, 77 U.S. App. D.C. 171, 172, 133 F.2d 408, 409 (1943): ". . . it goes without saying that a plea of guilty at that time [arraignment] can be and often is changed, on proper motion, *as a matter of course*." (Emphasis added.) An accused moving to withdraw his plea *after* sentence is faced with the formidable barrier of having to show that his conviction was manifestly unjust. [All emphases are the court's.][11]

Aside from the lenity which should be favored when withdrawal is sought before sentence, "the court's discretion should be exercised liberally" in any event. *Bergen* v. *United States*, 145 F.2d 181, 187 (C.A. 8).[12] "The right to trial by jury being one of the most valuable and most highly cherished rights guaranteed by the Constitution, the courts have been understandably slow in holding an accused to an election to waive this right and enter a plea of guilty;"

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[10] Note, "Withdrawal Of Guilty Pleas In The Federal Courts," 55 Colum. L. Rev. 366, 379 (1955). The general subject is also canvassed in Note, "Federal Criminal Procedure—Withdrawal Of Guilty Pleas," 22 U. of Chi. L. Rev. 730 (1955); Comment, "Withdrawal Of Guilty Pleas Under Rule 32(d)," 64 Yale L. Jour. 590 (1955). An annotation may be found at 99 L.Ed. 217, dealing primarily with the withdrawal of the plea *after* sentence. Further annotations are cited therein, *id.* at 218, n. 3.

[11] Handed down by a panel composed of Judges Bazelon, Washington and Danaher on the same day that the petition was granted in this case, this opinion is the first of which we know that expressly recognizes the distinction drawn by Rule 32(d) between motions to withdraw a guilty plea made before and after sentence.

[12] See also, *State* v. *Paglianich*, 43 Idaho 409, 252 Pac. 177, 181.

Leonard v. *United States*, 231 F.2d 588, 590 (C.A. 5). Particular factors which influence judgment have been enumerated in *United States* v. *Lias*, 173 F.2d 685, 688 (C.A. 4), quoting with approval from 14 Am. Jur., Crim. Law, § 287, p. 961:

> The *least* surprise or influence causing a defendant to plead guilty when he has *any defense at all* should be sufficient grounds for permitting a change of plea from guilty to not guilty. Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge; through fear, fraud, or official misrepresentation; *was made involuntarily for any reason;* or even if it was entered inadvisedly, *if any reasonable ground is offered for going to the jury.* (Emphasis supplied.)

And so, "it may be said that the withdrawal of a plea of guilty should not be denied in any case where it is *in the least evident* that the ends of justice will be subserved by permitting not guilty to be pleaded in its place." 14 Am. Jur., Crim. Law, § 287, p. 961 (emphasis supplied). "The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for *any* reason the granting of the privilege seems fair and just." *Kercheval* v. *United States*, 274 U.S. 220, 224 (emphasis supplied).

In this case, petitioner requested leave to withdraw his plea of guilty within five days after he had entered it and before sentence was imposed. He did so immediately upon recovering sufficiently from his illness to realize "what I had did" in pleading guilty (R. 6). In these circumstances, while withdrawal of the guilty plea is not a matter of right, discretion in favor of it should be exercised with the utmost liberality.

II.

The Circumstances Disclosed by the Record, Singly or in Totality, Amply Show That Grant of Petitioner's Motion to Withdraw His Plea of Guilty Is Required.

Evaluation of the circumstances disclosed by this record, whether considered singly or in totality, amply demonstrates that the grant of petitioner's motion to withdraw his plea of guilty is required. We show that (1) petitioner pleaded guilty when he was sick and in pain; (2) a grave question exists whether petitioner is innocent of the crime to which he pleaded guilty which the District Court failed to apprehend because of its plainly erroneous views of the law pertinent to self-defense; and (3) petitioner was without the assistance of counsel either in the preparation or presentation of his request to withdraw his plea of guilty, and the adequacy of petitioner's representation when he entered his plea of guilty is seriously in doubt.

A. Petitioner Pleaded Guilty When He Was Sick and in Pain

Petitioner explained that he sought to withdraw his guilty plea because he made it when he "was sick and not myself" (R. 3, 6). As a result of related ailments he was, in fact, hospitalized both before and after he pleaded guilty. Two days after he entered the plea he was taken to the District of Columbia Jail Infirmary on a stretcher and penicillin and ice packs were administered for three days (R. 21-23, *supra*, n. 5). It was only then that he recovered sufficiently and "realised what I had did" in pleading guilty; he therefore promptly wrote to "Honable Judge Alexander Holtzoff telling him I was sick at the time I plea guilty I was not myself" (R. 6). Petitioner was hospitalized on this occasion for 19 days with a diagnosis of

epididymitis (R. 21, *supra*, n. 5). A little more than two weeks before he pleaded guilty, petitioner had been hospitalized in the District of Columbia General Hospital for 14 days with a diagnosis of multiple urethral strictures and acute cystitis, involvements related to each other and to epididymitis (R. 24, *supra*, n. 5).

It is apparent that petitioner was a thoroughly sick person. His periods of hospitalization, both shortly before and immediately following his plea of guilty, confirm his statement that he "was sick and not myself" when he entered his plea and that for that reason he had not then "realised" what he was doing. As he stated in his affidavit in the court below (R. 18):

> The next time I was to have the trial was October 16. I was sick on that day. I was nervous and shaky. I was upset with pain. I couldn't pass water. I was a perfect wreck. I had sweat spells. My words weren't plain. I couldn't put my words together. I was in such pain, to get it over with, I pleaded guilty.

The severity of petitioner's ailment is confirmed by the medical literature (Lowsley and Kirwin, Clinical Urology, vol. 1, p. 207 (3d ed. 1956)):

> The symptoms of acute gonococcal and nonspecific epididymitis are similar, except that in the latter cases they are usually less severe. Occasionally, the onset is mild, but as a rule there is great pain, tenderness, and swelling of the epididymis, accompanied by chills, fever, nausea, and prostration. Sometimes the pain radiates to the rectum, lower back, or lower part of the abdomen, and there is frequently inguinal discomfort and pain along the cord. Motion exaggerates the discomfort and walking may be impossible.

The treatment is described as follows (*id.* at 208):

> The treatment consists in rest in bed, elevation and support of the scrotum, cold applications, sedatives for pain, and antibiotic or chemotherapeutic measures, depending on the causative organisms. The sulfonamides and penicillin have greatly reduced both the incidence and severity of gonococcal epididymitis, and are also effective in nonspecific infections, as are some of the newer antibiotics.
>
> Incision and drainage becomes necessary at the first sign of suppuration, and occasionally for the relief of tension. This usually obviates epididymectomy or epididymo-orchiectomy.
>
> When a chronic epididymitis is secondary to a prostatitis or seminal vesiculitis, treatment must also be directed to these organs. Conversely, a chronic epididymitis may be responsible for maintaining a vesiculitis or prostatitis, and epididymectomy may be indicated in such circumstances.

Petitioner's averments harmonize with the objective description. He stated he was carried to the infirmary on a stretcher (R. 6); this conforms with the description that "Motion exaggerates the discomfort and walking may be impossible." He stated that he was administered penicillin and ice packs (R. 6); this conforms with the description that treatment includes "cold applications . . . and antibiotic or chemotherapeutic measures. . . ." And his statement (R. 6) that he had not realized what he was doing is consistent with the description that "as a rule there is great pain, tenderness and swelling, accompanied by chills, fever, nausea, and prostration." The report of the senior medical officer of the Jail Infirmary confirms that the ailment suffered by petitioner "is a painful condition" (R. 23).[13]

[13] This report (R. 23), and the earlier report of the medical officer (R. 21), also fully confirm petitioner's description of his treatment.

Finally, a little more than two weeks before he pleaded guilty, petitioner had been hospitalized with a diagnosis of multiple urethral strictures and acute cystitis, extremely painful involvements related to each other and to epididymitis.[14]

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[14] Strictures are described as follows (Lowsley and Kirwin, Clinical Urology, vol. 1, p. 315 (3d ed. 1956)):

> The most common symptoms of stricture of the urethral canal are a persistent discharge and some disturbance of urination: frequency, difficulty, decrease in the size and projectile force of the stream, dribbling. Later, with infection of the urethra and bladder, the urine becomes cloudy from pus and mucus. Acute retention may be the reason for the patient seeking medical aid. In long-standing cases, overflow incontinence may occur.
>
> Some patients complain of painful erections. Occasionally, a stricture is so located as to prevent complete ejaculation of the semen, which either dribbles out of the urethra after coitus or flows backward into the bladder, to be evacuated in the urine. There may be impaired virility or even complete impotence.
>
> Untreated or improperly treated strictures may have serious consequences. Dilatation of the urethra behind the stricture results in infiltration of the tissues of the wall. Rupture of the urethra in the vicinity of the stricture, with extravasation, infection, and the formation of urinary fistulas, may take place.
>
> Remote complications are the changes in the urinary tract due to back pressure and infection. In stricture with chronic posterior urethritis, the prostrate and seminal vesicles are usually also involved. Though the stricture is seldom so tight as to cause complete retention, with strictures of small caliber the stream is frequently reduced to a mere thread. Residual urine is constant. Long continuance of the condition eventually produces cystitis and, in the absence of treatment, damage to the upper urinary tract.

Acute cystitis is described as follows (Christopher, Textbook of Surgery, p. 1240 (4th ed., 1945)):

> Acute cystitis is of sudden onset, with frequent and painful urination. The disturbance may vary from mild burning on voiding, associated with exaggerated day and night frequency, to a condition of violent pain and spasm, with marked urgency and frequency. There may be severe terminal bladder spasm and hematuria. Pus is constantly present in the urine. Except in interstitial cystitis, there is no suprapubic pain, and all the discomfort is referred to the neck of the bladder, urethra, perineum or glana penis.

Petitioner surely makes an ample showing of severe and painful illness at the time he entered his plea of guilty.[15] Yet, despite the fact that ill-health was the basis upon which leave to withdraw the guilty plea was predicated, expressed by petitioner both in writing in advance of the hearing (R. 3) and orally at the hearing (R. 11-12), the District Judge did not make the slightest inquiry into the question. Not a single word was directed to it. Neither holding an accused to a guilty plea entered when he was sick and in pain, nor the failure to make any inquiry into the question, is in keeping with civilized administration of criminal justice.

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[15] In his affidavit in the court below, filed by the Government in response to petitioner's affidavit, the attorney appointed by the District Court to represent the petitioner stated that at the time petitioner entered his plea of guilty he did not appear to be in ill-health (R. 29-30). The affidavit does not state the length of time that the attorney was with petitioner, nor are we otherwise apprised of the attorney's opportunity or capacity for observation. Furthermore, such testimony is inadmissible for it necessarily entails "a violation of the attorney-client privilege and would also invade accused's right to counsel in the trial of the criminal charge." *Gunther* v. *United States*, 230 F.2d 222, 224 (C.A.D.C.). In the cited case, the Court of Appeals had remanded the case for a hearing to determine the defendant's competency when he stood trial. At this hearing the defendant was assigned new counsel, and his original attorney was called to testify as to his opinion of the defendant's competency. Said the Court of Appeals (230 F.2d at 223-224):

> At the hearing on competency the lawyer who had been trial counsel for Gunther was called as a witness on behalf of the Government. He was asked whether in his opinion as a layman he felt Gunther was competent to stand trial and to assist him during the course of the trial. We are of opinion this lawyer could not be called upon to testify upon that matter. If trial counsel in a criminal case could be called by the Government and asked to give an opinion as to the accused's competency and ability to assist in the defense, he could necessarily be asked for the factual data upon which he premised his opinion. These questions would open to inquiry by the Government the entire relationship between the accused and his counsel. Such revelations would be a violation of the attorney-client privilege and would also invade accused's right to counsel in the trial of the criminal charge.

Thus, it seems plain that physical illness can be so severe, painful, and debilitating that it impairs the victim's ordinary capacity for discernment, judgment, and deliberation. For so awesome a decision as the entry of a guilty plea, upon which imprisonment without trial hangs, the law should be satisfied with nothing less than the maximum acuity and perception that an accused has the capacity to muster when he is in ordinary good health. Even if the capacity to exercise a discriminating judgment be unimpaired, it demeans the law to permit an accused to enter, or to hold him to, a guilty plea made when the accused should have been in a hospital bed and not a court room.

On this record it is not possible to say that petitioner's plea of guilty was uninfluenced by sickness and pain. On the contrary, he swears, and the surrounding circumstances corroborate, that "I was in such pain, to get it over with, I pleaded guilty" (R. 18). Petitioner was hospitalized immediately after and shortly before he pleaded guilty; he pleaded not guilty when arraigned (R. 2); he repeatedly resisted the suggestions of his court-appointed counsel to plead guilty to assault, protesting his innocence of the crime (R. 17-18); and he requested leave to withdraw his plea of guilty, within five days after he had entered it and before sentence was imposed, immediately upon recovering sufficiently from his illness to realize "what I had did" in pleading guilty (R. 6). Based upon any standard of fairness and justice—and surely in the light of the utmost liberality with which motions to withdraw guilty pleas before sentence should be allowed—vacation of the guilty plea is required without further ado.[16]

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[16] While "any reason" in fairness and justice suffices (*Kercheval* v. *United States*, 274 U.S. 220, 224), the showing in this case falls easily within the traditional rubrics which require vacation of a guilty plea not "understandingly made" (*Leonard* v. *United States*, 231 F.2d 588, 590 (C.A. 5); see also, *Friedman* v. *United States*,

B. A Serious Question Exists Whether Petitioner Is Innocent of the Crime to Which He Pleaded Guilty Which the District Court Failed to Apprehend Because of Its Plainly Erroneous Views of the Law Pertinent to Self-Defense

As we have said, the District Judge made no inquiry into the question whether the plea of guilty was entered when petitioner was sick and in pain. Instead of inquiring into the question of petitioner's health, the District Judge conducted an inquisition of petitioner for the purpose of attempting to demonstrate that the admitted shooting was not justifiable as self-defense.[17] The inquiry was thus wholly misdirected. For "withdrawal should not be denied where a proper showing for its allowance is made, merely because the defendant on a trial might or probably would be found

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200 F.2d 690, 696 (C.A. 8); *Bergen* v. *United States*, 145 F.2d 181, 187 (C.A. 8); *Gannon* v. *United States*, 208 F.2d 772 (C.A. 6)), or "voluntarily entered" (*Shelton* v. *United States*, 242 F.2d 101, 113 (C.A. 5); see also, *United States* v. *Lias*, 173 F.2d 685, 688 (C.A. 4)). Rule 11 of the Federal Rules of Criminal Procedure provides that: "The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." "Surely the standard for determining whether a plea of guilty should be withdrawn prior to sentence under Rule 32(d) is not less favorable to the defendant than the standard for acceptance of such a plea under Rule 11." *United States* v. *Lester*, 247 F.2d 496, 501 (C.A. 2). In this case, had the District Judge made that "penetrating and comprehensive examination of all the circumstances" which it was his duty to make prior to acceptance of the plea (*id.* at 500), the circumstances would then have been disclosed obligating him to refuse to accept the plea of guilty in the first place. See *Von Moltke* v. *Gillies*, 332 U.S. 708, 719 and n. 5.

[17] "Ours is the accusatorial as opposed to the inquisitorial system. • • • Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.'" *Watts* v. *Indiana*, 338 U.S. 49, 54.

guilty." *Bergen* v. *United States*, 145 F.2d 181, 187 (C.A. 8). ". . . the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence." *Kercheval* v. *United States*, 274 U.S. 220, 224. See also, *Von Moltke* v. *Gillies*, 332 U.S. 708, 719; *Shelton* v. *United States*, 242 F.2d 101, 113 (C.A. 5).[18]

While the probability of guilt does not warrant denial of an otherwise meritorious request to withdraw a plea of guilty, the reasonable possibility of innocence surely warrants the grant of the request. Petitioner has constantly maintained that the admitted shooting in which he engaged was "in my self-defense" (R. 17-18, 19). The assertion by the District Judge at the first hearing on October 16, 1956, when the guilty plea was entered, that "certainly it is not self-defense" (R. 9), and his reiteration on November 2, 1956, at the hearing upon petitioner's request to withdraw his guilty plea, that "You [petitioner] have not said anything to justify the shooting" (R. 13), are based on plainly erroneous views of the law relevant to self-defense. We believe it demonstrable that a serious question exists, for determination by a jury, whether the admitted shooting in which petitioner engaged was justifiable as an act of self-defense.

1. The District Judge was apprised that the complainant, Robert Allen, beat petitioner in his own house three times on the same day (R. 9, 12). Petitioner suffered a fractured nose and two black eyes (*ibid.*). When, the same

[18] And see, *State* v. *Paglianich*, 43 Idaho 409, 252 Pac. 177, 178: "This is not a trial. It is unnecessary and would be improper for us to pass upon the sufficiency of the evidence to establish murder in the first degree, or any lack of evidence to reduce the offense to second degree murder or manslaughter. . . ."

day, the complainant was about to assault petitioner a fourth time, again in petitioner's own house, petitioner shot him "in my self-defense" (R. 12). The District Judge was further informed of petitioner's statement that "the prosecuting witness has frequently carried a razor" (R. 9).

2. The assertion of the District Judge that no question of self-defense exists evidently stems from his view that a battery with fists cannot create a risk of serious bodily harm sufficient to justify the victim of the assault in shooting in self-defense (R. 12). This is true neither in common sense nor in law. Men have died, in and out of the prize ring, from fist blows. No one would say that a five feet, one hundred pounder does not risk serious bodily harm at the hands of a six feet, two hundred pounder. Whether the risk exists in any particular case must depend on the relative health, strength, size, age, and prowess of the specific individuals. In this case, the fractured nose and two blackened eyes already suffered by petitioner hardly suggest that he was the complainant's pugilistic equal.[19] Petitioner did not merely risk serious bodily harm at complainant's hand, he had already suffered it. It was therefore a question for the jury as to whether petitioner, when assaulted the fourth time, reasonably anticipated serious bodily harm justifying shooting in self-defense.

The law follows what common sense dictates. In *High v. State*, 26 Tex. App. 545, 10 S.W. 238, the defendant shot and killed his assailant, after the assailant had knocked out defendant's tooth, thrust defendant against a railroad car, and it seemed as if the assailant was about to strike the defendant again. The court said (10 S.W. at 241):

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[19] According to petitioner's affidavit filed in the court below (R. 18), petitioner is 46 years old, 5 feet, 8 inches tall, and, at the time of the incident, weighed 160 pounds. The complainant "is 5 feet, 9 inches tall, weighs at least 190 pounds and is 42 years old. He is heavily built, broadchested. I am no match for him."

> Now if defendant had already received serious bodily injury at the hands of the deceased, and it reasonably appeared to him from the acts and conduct of the deceased that the combat was not over; that he was about to receive additional bodily injury from deceased; that deceased had the ability to inflict injury; that the danger was threatening and imminent; and under such circumstances he shot and killed deceased, —then under the law . . . he would be justifiable upon the grounds of necessary self-defense, and if a jury so believe from the evidence it would be their duty to acquit him.

Again, in *Easterling* v. *State*, 267 P.2d 185 (Okl. Cr.), defendant knifed her assailant, who later died of shock from the wound, to defend herself against a beating with fists. The trial court instructed the jury that no person has the right to use a dangerous weapon to repel a simple assault without weapons. This holding was reversed on appeal, the court stating (267 P.2d at 188):

> . . . it cannot be said to be true that in all cases where fists are used in making an attack on another that the person attacked would not be legally justified in using a deadly weapon. . . . There may be such a difference in the size of the parties involved or disparity in their ages or physical condition which would give the person assaulted by fists reasonable grounds to apprehend danger of great bodily harm and thus legally justified in repelling the assault by the use of a deadly weapon.

And so, in such cases of assaults with fists, "The question of whether there was a real or apparent danger to the defendant of death or great bodily harm is one of fact for the jury. The defendant is not bound at his peril to divine the intent of his assailant. . . . When the court assumes

to apportion the amount of real or threatened danger, it invades the province of the jury." *State* v. *Rader*, 94 Ore. 432, 186 P. 79, 86.

That is what the District Judge did in this case. He assumed as a rule of law that no assault with fists can justify shooting in self-defense. The true rule is that whether it does or not depends upon the particular circumstances of the case and is for a jury to decide.

3. Equally baseless is the refusal of the District Judge to ascribe any significance to the statement that "the prosecuting witness has frequently carried a razor" (R. 9). As to this statement, the District Judge stated, "No. The prior assaults by the victim of an assault is not sufficient to justify self-defense" (R. 9). The District Judge missed the point. Clearly, "evidence of deceased's violent character might have been given, *also that he habitually carried firearms or other deadly weapons . . .*" *Preston* v. *United States*, 65 App. D.C. 110, 111, 80 F.2d 702, 703. (Emphasis supplied.) In determining a defendant's reasonable apprehension of harm it is pertinent to consider "all the evidence tending to show that the defendant had heard and knew of the conduct and character of the deceased." *Sacrini* v. *United States*, 38 App. D.C. 371, 377. "It is proper to give incidents or specific acts of violence within the knowledge of the witness or coming within his specific observation." *Marshall* v. *United States*, 45 App. D.C. 373, 383. For the "true test for the application of the jury is whether the circumstances presented to the mind of the defendant were such that they would have produced upon the mind of any reasonable, prudent person, situated as defendant was at the time, the reasonable belief that the deceased was about to kill him or to do him serious bodily harm." *Id.* at 384. It is hard to imagine a circumstance more pertinent to the substantiality of a plea of self-defense than that the defen-

dant knew that his assailant habitually carried a razor. See *Smith* v. *United States*, 161 U.S. 85.

4. We have thus far discussed the matter upon the assumption that reasonable apprehension of serious bodily harm is essential to establish self-defense even though the defending act does not result in homicide. And we have shown that under the circumstances disclosed it was for a jury to say whether petitioner acted from such apprehension.

There is, moreover, strong authority for the proposition that, to justify the use of force to repel an attack, where the defending act does not result in death, it is unnecessary to show risk of serious bodily harm; it is enough to justify an act in self-defense that the person is resisting an assault, even if the assault does not threaten serious bodily harm. *State* v. *Woodward*, 58 Idaho 385, 74 P.2d 92, and cases cited, 74 P.2d at 95-96. As stated in the *Woodward* case (74 P.2d at 96-97):

> It is true, as stated in this instruction, that one, assailed or threatened with imminent danger to life or of great bodily injury, has the right to defend himself, and, if the danger or peril is of such apparent imminence, may use a deadly weapon in his defense; but this does not include the entire scope of the right of self-defense. The right of self-defense arises the moment an attack is made, even though the party assailed may not have reason to believe that his assailant intends to inflict upon him "great bodily injury." It may be, as it perhaps was here, that the assailant intends to chastise or whip his victim without any real or apparent intention of inflicting serious bodily injury, but the moment he makes the attack, or it becomes reasonably apparent that he intends to execute such

purpose, and has the present ability so to do, the right of defense arises and clothes the intended victim with legal authority to resist, and, if possible, prevent the execution of such unlawful purpose. No man has a right to lay hostile, threatening hands on another, except when he is armed with legal authority to do so; and the man who does so acts at the risk of being met with sufficient superior force and violence to overcome such assault.

* * *

The law does not require any one to submit meekly to indignities or violence to his person; he may lawfully repel them or it with as much of such character of necessary resistance as is at the time available to him.

* * *

Now, in the present case, it seems clear from the evidence that Spray knew or at least thought he could whip and beat appellant to his satisfaction without risk to himself; appellant no doubt felt that Spray could do so, and it may be that there was not enough imminent manifestation of intention to inflict great bodily injury to justify the use of a deadly weapon; but if that was true, still it did not deprive appellant of the right to resist force and violence by a sufficient quantum of force or violence on his part to protect his person. The instruction was too restricted for the state of facts it was intended to cover.

And so, in this case, complainant clearly subjected petitioner to an assault, and petitioner therefore had the right to resist. His right to defend existed whether or not the assault he was repelling threatened serious bodily harm. The only question presented, to be determined by a jury, was whether the quantum of force used by petitioner was

in excess of what under the circumstances appeared reasonably requisite to repel the assault. And in determining this question, "allowance must be made for the exigency in which the actor is placed by the other's conduct and the necessity for a rapid decision as to the means which he will use in his own defense. Even the most reasonable of men, confronted with the necessity of defending himself against a real or apparent attack, cannot be expected to measure accurately the exact amount of force necessary to repel it. It is only where there is a glaring discrepancy between the force applied and that which is necessary to prevent the apprehended harm, or where it is obvious that the actor knows or should know that he can defend himself by a lesser force that it is for the court to rule that the force applied is excessive. Otherwise it is for the jury to determine whether the force is or is not excessive." Restatement, Torts, § 70, Comment c.

5. We have thus far discussed the question of self-defense upon the basis of the matter of which the District Judge was apprised. The additional facts shown by petitioner's affidavit filed in the court below place the seriousness of the question beyond the possibility of cavil. After describing the three previous assaults to which petitioner had been subjected by Allen that same day, the affidavit reads (R. 19):

> Shortly before midnight, Sunday, July 8, 1956, I went home. As I was trying to open the door in the dining room which leads to the stairs to my quarters in the basement, Allen rushed towards me with his right hand up. There was something in his right hand which was shining. I knew he carried a razor; he showed it to me many times. I shot Allen to defend myself. He fell on my left foot.

Were a jury to accept petitioner's statement, it would be required to acquit him.[20] See *Smith* v. *United States*, 161 U.S. 85. If Allen were rushing towards petitioner with a razor in his raised right hand, the shooting would be a clear act of self-defense. And the same is true even if there were no razor actually in Allen's hand but petitioner reasonably thought there was. ". . . if one would have been justified or excused in doing an act if the facts had actually been as he thought they were, then he is excused for doing such act if he had reasonable grounds to believe and did believe that the facts were as he thought them, and he used reasonable efforts to ascertain the facts." Miller, Handbook of Criminal Law, 202 (1934), and see *id.* at 156.

6. The upshot is that there exists a serious question of self-defense for determination by a jury. The District Judge clearly erred in his conclusion that petitioner, "on his own statement, . . . does not set forth sufficient facts which would warrant a plea of self-defense" (R. 14). That error derives from the District Judge's plainly erroneous views of the law relevant to self-defense. Denial of leave to withdraw a guilty plea cannot be sustained where the sole basis for it is rooted in a mistake of law. On the facts of record, innocence is not only reasonably possible but probable. Justice requires that petitioner be given the opportunity he seeks to have a jury decide the question.

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[20] The facts stated in the affidavit had been told by petitioner to the attorney appointed to represent him in the District Court (R. 19), but the attorney had not apprised the District Judge of it, and the District Judge's own inquiry was not of the sort likely to adduce matter helpful to petitioner.

C. Petitioner Was Without the Assistance of Counsel in the Preparation or Presentation of His Request to Withdraw His Plea of Guilty, and the Adequacy of Petitioner's Representation When He Entered His Plea of Guilty Is Seriously in Doubt

1. *Absence of representation on the motion to withdraw the plea of guilty*

Petitioner was without the assistance of counsel either in the preparation of his request for leave to withdraw his guilty plea or at the hearing upon it. Thus the fundamental protection of "the guiding hand of counsel at every step in the proceedings" (*Powell* v. *Alabama*, 287 U.S. 45, 69) was not vouchsafed the petitioner.

Petitioner's request to withdraw his guilty plea was written in his own hand. He had no assistance of counsel in the preparation of it (R. 17). He was equally without the assistance of counsel at the hearing upon it. Indeed, not only was petitioner without counsel, but the attorney whom the District Court had appointed to represent petitioner took a position adverse to petitioner at the hearing upon his request to withdraw his plea. Thus, when this attorney was asked by the District Judge at the hearing whether he "wish[ed] to say anything," the attorney said, "I have nothing to say" (R. 13). But he did not remain silent. He stated that petitioner "knew the circumstances" when he pleaded guilty; he expressed surprise that petitioner desired to change his plea; and he deprecated the defense that petitioner was trying to articulate (R. 13). It is not simply that petitioner had no representation or but token representation.[21] The attorney who had been appointed to

[21] *Powell* v. *Alabama*, 287 U.S. 45, 52-59; *Von Moltke* v. *Gillies*, 332 U.S. 708, 722-723; *Gadsden* v. *United States*, 223 F.2d 627, 631-632 (C.A.D.C.), and cases cited.

represent him took a position opposed to him. Petitioner had worse than no representation at all.

There can be no question but that petitioner needed the effective assistance of counsel. His lack of articulateness and of any semblance of a trained mind is manifest. Furthermore, at the time of his hearing upon his request to withdraw his plea of guilty, November 2, 1956, petitioner had still not been discharged from the Jail Infirmary, and was not discharged until three days later, November 5, 1956 (R. 21). As petitioner stated in his letter "to appeal my case," "I was back in court to see Honable Judge Alexander Holtzoff to tell him why I want to change my plea of guilty to not guilty. I try to explain to him but I just could get the words together. Because I was still sick and was still in the hospital" (R. 6).

The approach of the District Judge to petitioner's request to withdraw his plea was detectably antagonistic, certainly not sympathetic or helpful, and petitioner was neither intellectually nor psychologically equipped to break a lance with him. Nor should he have been expected to. "It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right.[to counsel] *at every stage of the proceedings.*" *Von Moltke* v. *Gillies*, 332 U.S. 708, 722. (Emphasis supplied.) "The right to counsel is not a right confined to representation during the trial on the merits." *Moore* v. *Michigan*, 355 U.S. 155, 160.[22] And at whatever the stage the "court should protect the right of an accused to have the assistance of counsel." *Glasser* v. *United States*, 315 U.S. 60, 71.

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[22] See also, *Powell* v. *Alabama*, 287 U.S. 45, 57, 69; *Johnson* v. *Zerbst*, 304 U.S. 458, 463; *Poole* v. *United States*, C.A.D.C., Nos. 14,012, 14,013, 14,014, decided November 12, 1957, sl. op. p. 7; *Kraft* v. *United States*, 238 F.2d 794, 799 (C.A. 8).

The withdrawal of a guilty plea is as important a stage in a criminal proceeding as any. The safeguards that the procedure for withdrawal is designed to afford cannot be realized without the assistance of counsel. It is therefore essential that a defendant have the assistance of counsel, in the absence of an intelligent and informed waiver, in a proceeding under Rule 32(d). Petitioner had none.

2. *The inadequacy of petitioner's representation when he entered his plea of guilty*

The injustice of holding petitioner to his plea of guilty is further shown by the fact that the adequacy of his representation when he entered his plea is seriously in doubt.

In his opening statement to the District Judge, made at the time that petitioner pleaded guilty, petitioner's attorney stated, after mentioning the three prior assaults upon petitioner, that "I suppose he was a little upset after being attacked three times, and unfortunately, he pulled this gun out and shot this man" (R. 9). This pallid and apologetic statement was followed by the expression of the District Judge that "Of course, that is no defense," to which petitioner's attorney replied, "I agree with Your Honor . . ." (R. 9). This agreement was apparently based on concurrence with the mistaken view of the law that no battery with fists justifies shooting in self-defense. Petitioner's attorney did add that "except he [petitioner] does say that the prosecuting witness has frequently carried a razor" (R. 9). The District Judge responded, "No. The prior assaults by the victim of an assault is not sufficient to justify self-defense" (R. 9). Counsel permitted this mistaken disposition of the significance of carrying a razor to pass without comment. Thus, the District Judge's plainly erroneous views of the law pertinent to self-defense were shared or acquiesced in by petitioner's attorney. Yet counsel is needed precisely because "Even the intelligent and edu-

cated laymen," much less "the ignorant and the illiterate," cannot unaided adequately understand the reach of the law and its implications for him.[23] When an accused's attorney similarly lacks that apprehension, or fails to act upon it, it is the same as if the accused had no counsel at all.

According to petitioner's affidavit in the court below, prior to the first trial date on October 4, 1956, counsel spoke with petitioner for about 30 minutes on October 2 and for about 40 or 50 minutes on October 3 (R. 17). The adequacy of the time spent with petitioner in preparation for trial gives pause. At each of these meetings, rejecting the suggestions of his attorney to do so, petitioner stated that he would not plead guilty to the assault charge because he was not guilty of it; he would "rather go to trial" (R. 17-18). Despite this reiterated refusal to plead guilty to the assault charge, and without further discussions from October 3 up to October 16 (R. 17), counsel permitted petitioner to plead guilty to the assault charge on October 16.[24] At that time petitioner was sick and in pain. Finally, the attorney gave the Government an affidavit adverse to petitioner to be filed, as it was, with the court below (R. 29-30), apparently not sensitive to the abridgment "of the attorney-client privilege and . . . accused's right to counsel" which such an affidavit necessarily entails. *Gunther* v. *United States*, 230 F.2d 222, 224 (C.A.D.C.). See note 15 *supra*.

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[23] *Powell* v. *Alabama*, 287 U.S. 45, 69; see also, *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463; *Glasser* v. *United States*, 315 U.S. 60, 67; *Von Moltke* v. *Gillies*, 332 U.S. 708, 721-722; *Moore* v. *Michigan*, 355 U.S. 155, 160.

[24] The affidavit of the attorney appointed to represent petitioner in the District Court (R. 29-30) does not controvert petitioner's averments in his affidavit concerning the time spent with petitioner in preparation for trial, petitioner's refusal to accept the attorney's suggestions to plead guilty to the assault charge, petitioner's insistence that he was innocent of the assault charge, and the absence of any discussions between petitioner and his attorney from October 3 to October 16.

If the test of adequate representation is the effective "assistance of zealous and earnest counsel" (*Avery* v. *Alabama*, 308 U.S. 444, 450), this record leaves an unstillable sense of disquietude that petitioner did not enjoy "the constitutional right of an accused to assistance of counsel . . ." (*id.* at 445). And surely a serious doubt as to the adequacy of representation when a guilty plea is entered suffices to require that leave be granted to withdraw it. For no more is involved in withdrawal, where it is promptly sought before sentence, than that the accused shall have a jury trial at which his guilt or innocence may be established.

D. The Contention in the District Court That the Inconvenience to the Government in Going to Trial Justifies Denial of Leave to Withdraw the Plea of Guilty Is Trivial; and the View of the Court of Appeals That There Was "No Abuse of Discretion" Is Unresponsive to the Issues Presented, and Plainly Inadequate Even if It Were Responsive

In the District Court, the Government stated (R. 13-14), and the District Judge intimated (R. 11), that withdrawal of the plea of guilty should not be permitted because "The witnesses were here, the jury was here and we were ready to proceed. * * * The Government feels, at this stage now, we having been ready for trial, that the plea should stand."

It would no doubt have been an inconvenience to the Government to resummon its witnesses. It was no less an inconvenience to petitioner—and with consequences which were serious indeed—when he was ready for trial on October 4 but it was then continued until October 16 for lack

of an available courtroom.[25] Petitioner wrote to withdraw his plea within five days of its entry. In all likelihood, no witnesses could have disappeared; no documents could have been lost; no substantial interest in finality could have set in. The inconvenience to the Government of setting a new trial date is trivial to the point of absurdity when balanced against petitioner's interest that only a jury's determination of his guilt shall deprive him of his freedom from imprisonment.

No less unsatisfactory is the basis of the decision below. The Court of Appeals by a divided vote, Chief Judge Edgerton dissenting, stated briefly, "We find no abuse of discretion" (R. 15). Disposition of the issues in this portmanteau will not do. It is not discretionary but obligatory to permit a defendant to withdraw a guilty plea made when he was sick and in pain; it is not discretionary but obligatory to inquire into the question whether the defendant was sick and in pain; it is not discretionary but obligatory to grant an otherwise meritorious request to withdraw a guilty plea although the judge may be convinced the defendant is probably guilty; it is not discretionary but obligatory to apply correct views of the law relevant to the crime in assessing the guilt or innocence of the defendant; it is not discretionary but obligatory to vacate a plea of guilty when the establishment of innocence appears reasonably possible; it is not discretionary but obligatory that a defendant have the assistance of counsel upon a motion to withdraw a guilty plea; and it is not discretionary but obligatory to permit withdrawal of the guilty plea where the adequacy of the defendant's representation when he entered

[25] As petitioner states in his affidavit filed in the court below. "The trial was set for the next day, October 4, and I was feeling pretty good, but the trial was not held on that day. * * * [On October 16] I was in such pain, to get it over with, I pleaded guilty" (R. 18).

it is seriously in doubt. The unresponsiveness of the decision below to the issues presented is thus patent. The sound administration of criminal justice is not promoted by adjudication which sweeps the chessmen off the board. Moreover, even if it could be said that the issues lie within the domain of discretion, it is hard to imagine what more must be made to appear before abuse is shown.

A plea of guilty entered in circumstances so dubious requires vacation without further ado. The law does not need—indeed, it cannot tolerate—hostages of maladministered justice. We think the view expressed in *Ketring* v. *State*, 209 Ind. 618, 200 N.E. 212, 214, represents sound policy in the administration of justice:

> It is the policy of the law to give every one charged with a crime full opportunity to assert his innocence in a court of justice. In the instant case, no harm could have resulted to society or to the state by permitting a withdrawal by appellant of his plea of guilty and to allow him to plead not guilty and to make his defense. If he was, in fact, guilty, the state would have the right to establish the fact. If innocent, he should not have been imprisoned for a long period of time . . .

Petitioner moved "promptly, when he fully comprehended what happened. We cannot overlook this fact, and the fact that the state would have sustained no injury in a reasonable delay incident to determining the issue on its merits."[26] From his arrest about July 8, 1956, petitioner has been continuously imprisoned, a period as of the probable time of the argument of about one year and nine months. It is time the man had his trial.

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[26] *Shaw* v. *State*, 84 Okl. Cr. 63, 179 P.2d 169, 172.

CONCLUSION

For the reasons stated, the judgment below should be reversed, and the case remanded to the District Court with directions to vacate the judgment of conviction and to grant petitioner leave to withdraw his plea of guilty to count 1 of the indictment and to enter a plea of not guilty.

Respectfully submitted,

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